UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO

OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL 200, AFL-CIO AND OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO

and Case 21-CD-659

STANDARD DRYWALL, INC.,

and

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Los Angeles, California, on September 11 and 12, 2007, based upon the Second Order Consolidating Cases, Second Amended Consolidated Complaint and Amended Notice of Hearing (Complaint) issued on August 16, 2007, by the Acting Regional Director for Region 21. The Complaint alleges that Respondents Operative Plasterers' & Cement Masons' International Association (International) and Operative Plasterers' & Cement Masons' International Association, Local 200 (Local 200) have violated Section 8(b)(4)(ii)(D) of the Act by threatening, restraining and coercing Standard Drywall, Inc. (SDI) with an object of forcing SDI to assign work to employees who are members of or represented by, Local 200 rather than to employees who are members of or represented by Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Carpenters).

Specifically, Complaint paragraphs 10(a) through (d), 12 and 13 allege that the Pullen lawsuit and its amendments has had the effect of threatening restraining and coercing SDI with an object of forcing or requiring SDI to assign plastering work to Local 200 represented employees rather than to Carpenters represented employees.

Complaint paragraphs 10(e), 12 and 13 allege that Local 200's May 14, 2007 lawsuit in the Superior Court of the State of California Los Angeles County against SDI and the Carpenters seeking damages and injunctive relief based on SDI having assigned plastering work to Carpenters-represented employees rather then Local 200-represented employees has had the effect of threatening restraining and coercing SDI with an object of forcing or requiring SDI to assign plastering work to Local 200 represented employees rather than to Carpenters represented employees.

Complaint paragraphs 11(a) through (g) allege that the International, as agent for Local 200, pursued the Kelly and Greenberg grievances to arbitration, sought enforcement of the Kelly and Greenberg awards and pursued a grievance before the Administrator for the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry seeking plastering work performed by SDI employees. Complaint paragraphs 14 and 15 allege the conduct described in paragraphs 11(a) through (g) threatened, coerced and restrained SDI with an object of forcing or requiring SDI to assign plastering work to Local 200-represented employees rather than to Carpenters-represented employees.

Respondents filed timely answers to the Complaint denying any wrongdoing and affirmatively contend, inter alia, that pursuing the Pullen and Tortious Interference litigation, the

Kelly and Greenberg arbitration awards and the Plan complaint are not coercive conduct within the meaning of section 8(b)(4)(ii)(D) of the Act, the Board's underlying 10(k) determinations are in error and that there was a method to resolve jurisdictional disputes binding on all parties requiring the dismissal of the instant charges.

Findings of Fact

Upon the entire record herein, including briefs from the General Counsel, Charging Party and Respondents, I make the following findings of fact.

I. Jurisdiction

Charging Party SDI, a California corporation, with an office and principle place of business located in Riverside County, California and offices located in Arizona, Utah and Wyoming where it is engaged as a contractor in the drywall construction industry, has annually derived gross revenues in excess of $500,000 and purchased and received at its California projects goods and materials valued in excess of $50,000 directly from points located outside the State of California.

Based upon the above, I find that SDI is and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organizations

Based upon Respondents' admissions, I find that Respondents and each of them is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

The facts in this case are not in significant dispute. In their Answers Respondents have admitted most of the operative facts in the Complaint except Respondents deny that Local 200 demanded the disputed work from SDI, that the International continues to pursue grievances seeking the disputed work or that the International acted as an agent of Local 200.

SDI began performing plastering work On the Fine Arts Project at California State University at Fullerton in December 2004, using 10 of its employees represented by the Carpenters. Prior to this time, on October 24, 2004, Local 200 Business Manager Robert Pullen (Pullen) and Business Agent David Fritchel, as individuals, filed a lawsuit in California Superior Court for Santa Barbara County, (the Pullen suit) alleging SDI had violated California Labor Codes[1] requiring contractors to use State of California approved worker training programs and failed to pay prevailing wage law at public work sites in Southern California. On August 9, 2005, an amended complaint was filed in this lawsuit adding Local 200 as a plaintiff and seeking back pay for all Local 200 apprentices not employed by SDI as well as restitution and injunctive relief against SDI for failing to make apprenticeship contributions for apprentices it did not hire on all

[1] California Labor Code 1777.5 requires on public works projects that only apprentices in training under programs approved by the State of California are eligible for apprentice wages. Until November 2006 the Plasterer's apprenticeship program was the only program approved by the State of California. Local 200 exhibit 20 and transcript at page 176.

of its past, present and future public works projects in 12 Southern California counties.[2] The injunctive relief requested that SDI comply with applicable statutes and regulations including California Labor Code section 1777.5 requiring use of Plasterer's apprentices.

SDI filed unfair labor practice charges on February 2, 2005, alleging the Carpenters violated section 8(b)(4)(ii(D) of the Act by forcing it to assign plastering work to employees represented by Carpenters rather than Local 200.

A 10(k) hearing was held and on January 31, 2006 the Board issued its order in *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 346 NLRB No. 48 (2006) (SDI-I) awarding plastering work performed by SDI employees at the California State University Fullerton, Fine Arts Project to SDI employees represented by the Carpenters Union rather than Local 200.

In SDI I the Board found, and the record herein confirms, that SDI's California plastering employees were covered by a Memorandum Agreement with the Carpenters effective from January 1, 2002 to June 30, 2006 and that SDI and the Carpenters had a bargaining relationship of at least 10 years while SDI never had a bargaining relationship with the International or Local 200. The Board concluded that both the Carpenters and Local 200 laid claim on SDI for the disputed plastering work and that Local 200's disclaimer of the work was ineffective. In support of its finding that Local 200 made a claim on the SDI plastering work, the Board concluded that on May 2005 Local 200 told SDI that if SDI would sign an agreement assigning Local 200 the disputed work, Local 200 would try to dismiss the Pullen suit. The Board also found that the Pullen lawsuit had a jurisdictional object.[3] The Board found, based on the parties' stipulation and the absence of evidence to the contrary, that there was no voluntary method for adjustment of the work dispute.

While both Respondents deny the International acted as an agent of Local 200, they admit that on May 29, 2006, the International pursued a grievance to arbitration under the AFL-CIO's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Plan) before Arbitrator Tony A. Kelly who awarded plastering work being performed by SDI's employees in Southern California at the Central Los Angeles High School #2, the East Valley New Middle School #1, and the Cal Trans Replacement Facilities Shop #7 to employees represented by Local 200. (The Kelly award).

On February 7, 2006, SDI filed additional unfair labor practice charges alleging the Carpenters violated section 8(b)(4)(D) of the Act by threatening, coercing and restraining SDI with an object of forcing it to assign plastering work at three Los Angeles Unified School District projects to employees represented by Local 200 rather than to employees represented by the Carpenters.

On July 7, 2006, the International pursued a grievance under the Plan, alleging impediments to the Kelly award, and Arbitrator Paul Greenberg ordered SDI to withdraw any unfair labor practice charges filed with the Board, including but not limited to the charges at issue herein. (The Greenberg award).

After a 10(k) hearing, on December 13, 2006, the Board issued its decision in *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 348 NLRB No. 87 (2006) (SDI-II)

[2] GC Exhs. 2-3.

[3] *SDI-I*, id., fn. 8.

awarding plastering work performed by SDI employees represented by the Carpenters in all similar jobs performed by SDI on any public works projects in the 12 Southern California Counties. In SDI II the Board found, and the instant record establishes, that while Local 200 told SDI that it was not pursuing its Pullen lawsuit with respect to the finished Fine Arts project it continued to pursue the Pullen lawsuit against SDI on continuing public works projects. Also in February 2006 Local 200 Secretary-Treasurer Patrick Finley told SDI that it would drop the Pullen suit if SDI signed a contract covering SDI's California projects. On February 23, 2006 SDI informed the Carpenters that it had no choice but to assign plastering work to employees represented by Local 200, as Local 200 continued to pursue the Pullen lawsuit. In response, on February 24, 2006, the Carpenters told SDI that if SDI reassigned any work currently performed by members of the Carpenters Union, they would immediately strike SDI.

In SDI II the Board concluded that there were competing claims for the disputed plastering work, including the Carpenter's bona fide threat to strike SDI if work was assigned to Local 200. The Board reaffirmed Local 200's Pullen suit is a claim for the disputed work since it seeks compensatory damages and injunctive relief requiring that SDI use apprentices trained by a State of California approved apprenticeship program which only Local 200 can fulfill. In addition the Board found, as evidence of Local 200's claim to the disputed work, Local 200 Secretary-Treasurer Finley's statement that he would get the Pullen suit dismissed if SDI signed a contract with Local 200 covering SDI's California projects. The Board found that the Carpenter's threat to strike was jurisdictional not representational and that threat is proscribed by the Act. Further the Board concluded that the Carpenter's threat was genuine and not the product of collusion between the Carpenters and SDI.

Next the Board held that there was no voluntary means to adjust the work dispute. The Board found that Article VII and VIII of the Project Stabilization Agreement (PSA), requiring use of the Plan, was not a voluntary method to adjust work disputes as it covered only 3 of 97 potential jobs in dispute and because there are conflicting forums for resolving the work disputes in SDI's collective bargaining agreement with the Carpenters.

On January 9, 2007, the International requested the Plan administrator file a complaint against SDI seeking plastering work at all Los Angeles Unified School District public works projects in the 12 Southern California Counties.[4] On January 13, 2007 the International withdrew this complaint conditionally and stated that if it found work was included under the Plan it would reinstate the complaint.[5]

On January 9, 2007 the International[6] sought to enforce both the Kelly and Greenberg awards.[7] On January 13, 2007, the International advised the Plan administrator it withdrew its request for enforcement of the Kelly and Greenberg awards because SDI was in compliance with those awards.[8]

It is admitted that on May 14, 2007, Local 200 filed a lawsuit against SDI and the Carpenters in the Superior Court of the State of California County of Los Angeles (Tortious Interference Suit) seeking damages and injunctive relief requiring SDI and the Carpenters to

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[4] GC Exh.11.

[5] GC Exh.12.

[6] The record establishes that only the International may pursue a grievance under the Plan even though it is for the benefit of the local union.

[7] GC Exh.10.

[8] GC Exhs. 17-18.

comply with all applicable statutes and regulations including California Labor Code section 1777.5 that would have required SDI to hire Local 200 apprentices. The suit, which seeks $7,000,000 damages for lost wages and union dues, alleges that as a result of an unlawful kickback scheme, the Carpenters have caused SDI to withdraw plastering work from Plasterer's Union signatory contractors and assign plastering work to SDI's employees who are represented by the Carpenters.[9]

Both the International and Local 200 admit in their Answers and the record establishes that on June 22, 2007 Local 200 filed an amended lawsuit substantially similar to the Pullen suit and has continued to pursue that suit.[10]

B. Preliminary Rulings on Counsel for General Counsel's Motion to Preclude Evidence and SDI Motion to Revoke Subpoenas.

On September 6, 2007, Counsel for the General Counsel (CGC) filed a Motion to Preclude Evidence at Unfair Labor Practice Hearing. Both Respondents and SDI filed responses. After the hearing opened on September 11, 2007, I issued an Order Granting in Part Counsel for the General Counsel's Motion to Preclude Evidence at Unfair Labor Practice Hearing.[11] In the Order I found that Respondents could not relitigate certain threshold issues decided by the Board in the underlying 10(k) proceedings including whether the Board's underlying work determinations were valid, whether the matter was properly before the Board on jurisdictional issues, whether there was collusion between the Carpenters and SDI regarding the Carpenters demand for the disputed work, and whether a voluntary method for the resolution of work disputes existed binding the parties. However, I ruled that the record of the 10(k) proceedings in SDI I and SDI II should be made part of the record in this proceeding under section 102.92 of the Board's Rules and Regulations.[12]

On September 7, 2007 SDI filed motion to revoke subpoena duces tecum nos. B-504775 and B-504776. Local 200 filed its Opposition on September 8, 2007. At the commencement of the hearing on September 11, 2007, I issued an Order granting counsel for Standard Drywall, Inc.'s petition to revoke subpoena duces tecum nos. B-504775 and B-504776[13] on the grounds that the subpoenas sought documents not relevant to issues in this case, that is, issues previously decided by the Board in the underlying 10(k) proceedings including whether there was a jurisdictional dispute, whether there was collusion between SDI and the Carpenters and whether an agreement for the resolution of jurisdictional disputes exits that is binding on the parties to this proceeding.

At the conclusion of the trial, Respondents filed requests for special permission to appeal to the Board from the orders granting CGC's motion to preclude evidence and SDI's motion to revoke subpoenas. On December 21, 2007, the Board granted Respondents' request

[9] GC Exh.14.
[10] GC Exh.19.
[11] ALJ Exh. 3.
[12] Id. at 4.
[13] ALJ Exh. 4.

for special permission to appeal only to the extent that the record of the underlying 10(k) proceedings should be admitted into this record.[14]

C. Parties' Positions

In her post-hearing brief CGC raises five contentions:

1. Local 200 violated section 8(b)(4)(ii)(D) of the Act by pursuing the Pullen lawsuit after the Board issued its Decision and Determination of Dispute in SDI II.

2. Local 200 violated section 8(b)(4)(ii)(D) of the Act by filing and maintaining a lawsuit seeking damages for tortious interference with prospective economic advantage after the Board issued its Decision and Determination of Dispute in SDI II.

3. The International, as agent for Local 200, violated section 8(b)(4)(ii)(D) of the Act by pursuing the Kelly award after the Board issued its Decision and Determination of Dispute in SDI II.

4. The International, as agent for Local 200, violated section 8(b)(4)(ii)(D) of the Act by filing and pursuing the Greenberg award after the Board issued its Decisions and Determination of Disputes in SDI I and SDI II.

5. The International, as agent for Local 200, violated section 8(b)(4)(ii)(D) of the Act by filing a jurisdictional complaint under the Plan after the Board issued its Decision and Determination of Dispute in SDI II.

In their Joint Post-Hearing Brief Respondents argue that neither of Local 200's lawsuits may be enjoined by the Board under *BE&K Construction Co*., 351 NLRB No. 29 (2007) since the ongoing suits are not objectively or subjectively baseless and because the suits do not conflict with the Board's underlying 10(k) decisions herein, that enforcement of the Kelly and Greenberg awards is not coercive conduct violative of section 8(b)(4)(ii)(D) of the Act, that pursuit of the Plan complaint is not coercive conduct within the meaning of section 8(b)(4)(ii)(D) of the Act, that there is a voluntary method for the resolution of the work dispute herein and that there is no jurisdictional dispute within the meaning of the Act.

D. The Analysis

Section 8(b)(4)(ii)(D) of the Act provides:

It shall be an unfair labor practice for a labor organization or its agents,

> (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is:

[14] On January 2, 2008, SDI filed a Motion of Charging Party to Strike and/or Disregard Portions of Respondents' Joint Post-Hearing Brief. The Motion contends that, in view of the Board's order granting only that portion of Respondents' special appeal directing that the record of the 10(k) proceedings in SDI I and SDI II be included in the record herein, certain portions of Respondents' joint brief be stricken or disregarded because they present evidence or arguments that are irrelevant to these proceedings in light of the ALJ and Board's rulings. I will disregard those portions of Respondent's brief that are not relevant to the issues before me.

> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization, trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

1. The Pullen and Tortious Interference Lawsuits

In this case, Respondents contend that the Pullen and Tortious Interference suits are reasonably based in law and fact and do not conflict with the Board's 10(k) determinations. Respondents cite the various causes of action in the Pullen suit and argue that they do not require SDI to assign work but rather require compliance with state prevailing wage law, including record keeping, apprentice ratios, and making payments to the state approved apprenticeship programs. Respondents contend that the Tortious Interference suit likewise does not seek assignment of work but rather compels SDI to cease engaging in tortious conduct that interferes with Local 200's economic relations with signatory contractors.

To the contrary CGC and SDI contend that the Pullen suit has no legal merit and the only object of the suit is the unlawful coercion of SDI into making an assignment of work after the Board has issued its 10(k) determination.

In their recent decision in *BE&K*, *supra*, on remand from the Supreme Court in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Board majority of Chairman Battista and Members Schaumber and Kirsanow held that, "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit."[15] Thus in *BE&K,* the Board extended the prohibition on enjoining a well founded ongoing lawsuit as an unfair labor practice under *Bill Johnson's Restaurants, Inc., v. NLRB,* 461 U.S. 731 (1983) to completed litigation. In *Bill Johnson's*, the Court held, with respect to *ongoing* litigation, that "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if [the suit] would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.[16]" However, the Court created an exception to this rule:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its alleged retaliatory motive. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal law preemption, or a lawsuit that has an objective that is illegal under federal law. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not be lawfully imposed under the Act, . . . , and this Court has concluded that, at the Board's request, a district Court may enjoin enforcement of a state court injunction where the Board's power preempts the field.[17]

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[15] *BE&*K, slip op. at 1.
[16] *Bill Johnson's* at 743.
[17] Id. at 737 n. 5.

In *Manufacturers Woodworking Association of Greater New York, Incorporated,* 345 NLRB No. 36 (2005), a case involving the filing of a demand for arbitration to compel the Union to engage in an unlawful objective of causing the Union to induce a work stoppage that would violate Section 8(b)(4)(B) of the Act, the Board concluded that the *Bill Johnson's* principles have been applied to arbitration actions. See, e.g., *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir 1995). The Board went on to find that:

> Under *Bill Johnson's Restaurants, supra*, 461 U.S. 731, as a general rule a lawsuit enjoys special protection and can be condemned as an unfair labor practice only if it is filed with a retaliatory motive, i.e., motivated by a desire to retaliate against the exercise of a Section 7 right, and if it has no reasonable basis in fact or law. However, a lawsuit that is aimed at achieving an "unlawful objective" (or is preempted) "enjoys no special protection" under *Bill Johnson's* and may be enjoined. See *Bill Johnson's, supra,* 461 U.S. 747 fn 5. A lawsuit filed with an unlawful objective can be condemned as an unfair labor practice "[i]f it is unlawful under traditional NLRA principles." *Teamster's Local 776 (Rite Aid),* 305 NLRB 832, 835 (1991), enfd. 973 F. 2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).[18]

In support of their argument that the Pullen suit has no reasonable merit, CGC and SDI cite the Supreme Court's decision in *Cal. Div. of Labor Standards Enforcement v. Dillingham,* 519 U.S. 316 (1997) and the Ninth Circuit Court of Appeals decision in *Assoc. Builders and Contractors of So. Cal. Inc., v. Nunn*, 356 F.3d 979, 986 n. 4 (9th Cir. 2004) which hold that an employer is under no obligation under California Labor Code section 1777.5 to hire apprentices from an approved training program. These decisions hold that contractors have the option of hiring apprentices at a reduced wage or hiring journeymen at the prevailing journeyman rate. The Supreme Court in interpreting Labor Code section 1777.5 in *Dillingham* stated, "In most circumstances, California public works contractors are not obliged to employ apprentices, but if they do, the apprentice wage is only permitted for those apprentices in approved programs.[19]"

A long line of Board cases has held that after a Board 10(k) order and work determination a union that pursues a contrary arbitration award, lawsuits for enforcement of the arbitration award or lawsuits for damages in lieu of the work assignment engages in coercive conduct to achieve an unlawful object thereby violating Section 8(b)(4)(ii)(D) of the Act.

In *Longshoremen ILWU Local 32 (Weyerhaeuser Co.),* 271 NLRB 759 (1984), the Board rejected the argument that *Bill Johnson's* precluded a Board adjudication of whether an ongoing 301 suit could be enjoined. The Board held:

> Accordingly, we find that the Respondent's Section 301 action, which seeks to enforce an arbitration award contrary to the Board's 10(k) award and also seeks to achieve a prohibited objective, lacks a reasonable basis in fact and law. Therefore, the Court's decision in *Bill Johnson's* does not require a stay of proceedings.

In *Laborers Local 261 (W.B. Skinner, Inc.),* 292 NLRB 1035, 1035 (1989), after a Board 10(k) award, the losing union sought enforcement of an arbitrator's award granting employees it

[18] *Manufacturers Woodworking Association*, slip op. at page 4.
[19] *Dillingham* at 320.

represented in lieu of damages for lost wages and benefits as a result of the Board's award of the disputed work to employees represented by IBEW. The Board found:

> In support of his finding, the judge also cited the Board's decision in *Longshoremen ILWU Local 7 (Georgia-Pacific Corp.)*. 273 NLRB 363 (1984) In *Georgia-Pacific*, the Board held, inter alia, that the filing of grievances for payments in lieu of a work assignment, *before*, as well as after, a contrary 10(k) award has issued, violates Section 8(b)(4)(D).[20]

The Board in *Skinner* concluded:

> {T]hat by maintaining the suit after the Board had made its 10(k) determination, the Respondents sought to undermine the Board's 10(k) award and to coerce the Employer into reassigning to its members the work that the Board found had been properly assigned by the Employer to employees represented by IBEW Local 202. Accordingly, the Respondents' conduct in maintaining the suit after the 10(k) determination issued violated Section 8(b)(4)(D) of the Act.[21]

The first task in applying the above principles to the Pullen and Tortious Interference lawsuits is to determine if the suits fall within the *Bill Johnson's* exception to lawsuits aimed at achieving an unlawful objective.

The Pullen Lawsuit, as originally filed,[22] in the 5th Cause of Action alleges that under California Labor Code section 1777.5 SDI was required to hire Plasterers apprentices and failed to do so. The amended Pullen lawsuit[23] alleges that the only apprenticeship program SDI could hire apprentices from was the Plasterers program. Finally the Second Amended Pullen Lawsuit[24] filed after the Board's 10(k) awards herein seeks lost wages and benefits for Local 200 apprentices SDI failed to hire from October 29, 2000 to the present had it complied with Labor Code Section 1777.5.

Respondents contend that the Pullen litigation does not have an unlawful objective but rather seeks to enforce state prevailing wage laws. However, contrary to Respondent's position, Labor Code Section 1777.5 does not compel an employer to hire from approved apprenticeship programs. See *Dillingham* and *Nunn, supra*. Thus, there appears to be no basis in law for the Respondents' position in the Pullen lawsuit that SDI violated state labor codes when it failed to hire Local 200 apprentices.

Moreover, even if the Pullen suit claims to enforce state labor code prevailing wage standards, the effect of Local 200's suit is to compel SDI to pay damages for lost wages and benefits to employees represented by Local 200 SDI failed to hire contrary to the Board's 10(k) determination. The fact that since November 2006 SDI could have hired apprentices from a state approved Carpenter's apprentice program is irrelevant since the Pullen suit seeks damages both before and after November 2006. It appears that the purpose of the ongoing Pullen litigation is, like the court action in *Weyerhaeuser Co.* and *W.B. Skinner, Inc.*, *supra,*

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[20] *Skinner* at 1035.
[21] Ibid.
[22] GC Exh.2.
[23] GC Exh.3.
[24] GC Exh.19, page 2 lines 2-8.

inimical to the Board's 10(k) award. The continued pursuit of the Pullen litigation has an unlawful objective of compelling SDI to assign work to Local 200 represented employees or pay wages and benefits to Local 200 represented employees in lieu of actual work assignments. The pursuit of such lawsuits has an unlawful objective and has been found coercive conduct under section 8(b)(4)(ii)(D) of the Act.

I conclude that Local 200's ongoing pursuit of the Pullen suit, after the Board awarded plastering work to Carpenters represented employees in SDI-II, is aimed at achieving the unlawful objective of coercing SDI into assigning plastering work to Local 200 represented employees and therefore enjoys no special protection under *Bill Johnson's* or *BE&K* and violates Section 8(b)(4)(ii)(D) of the Act as alleged.

The Tortious Interference Lawsuit filed by Local 200, after the Board's 10(k) award in SDI-II, on May 14, 2007 in the Superior Court of California for the County of Los Angeles in its preamble and its substantive allegations notes that the Carpenters Union has sought to take over the work of Local 200, that through illegal kickbacks the Carpenters have induced SDI to withdraw its plastering work from Local 200 signatory contractors and instead assign that work to their own employees who are represented by the Carpenters, that but for the tortuous interference SDI would have continued to assign plastering work to Local 200 represented employees and that as a result of this conduct plastering employees represented by Local 200 have lost work and income and Local 200 has lost dues income. In this suit Local 200 seeks compensatory damages of $7,000,000, for members' lost income and its lost dues income. This lawsuit is similar in nature to the in lieu of damage lawsuits in *Weyerhaeuser Co.* and *W.B. Skinner, Inc*., *supra.* While Respondent's claim they are only seeking to enjoin tortuous activity by SDI, the effect is to cause SDI to assign work to Local 200 represented employees or pay over $77,000,000 in compensatory and punitive damages. This is coercive conduct that Local 200 concedes in its pleadings has as its object the return of plastering work to employees it represents.

Like the Pullen suit, the Tortious Interference suit has an unlawful object and is exempt from the *Bill Johnson's* and *BE&K* prohibitions on enjoining ongoing litigation. The filing and pursuit of this lawsuit is coercive conduct violative of section 8(b)(4)(ii)(D) of the Act as alleged.

2. The Kelly and Greenberg Arbitration Awards and the Plan Complaint

As noted above the Board has found that the pursuit of grievances to arbitration after a contrary 10(k) award is coercive conduct that violates section 8(b)(4)(ii)(D) of the Act. Where there is an unlawful object of the arbitration, the *Bill Johnson's* exception will apply and lawsuits and grievances may be enjoined. See *Longshoremen ILWU Local 32 (Weyerhaeuser Co.),* 271 NLRB 759 (1984), *Laborers Local 261 (W.B. Skinner, Inc.),* 292 NLRB 1035, 1035 (1989), *Ironworkers local 433 (Swinerton & Walberg Co.),* 308 NLRB 757, 761 (1992).

Respondents contend that seeking enforcement of the Kelly and Greenberg arbitration awards and requesting the Plan administrator file a complaint were not coercive since Local 200 has no authority to file Plan grievances and neither the Local nor the International have authority to enforce Plan awards.

Respondents argue further that their attempts to enforce the Kelly and Greenberg awards are not coercive since they withdrew their requests for enforcement of the arbitration awards and the Plan complaint and since Respondents' mere failure to provide assurances that it will comply with a 10(k) award is insufficient to establish coercion within the meaning of section 8(b)(4)(ii)(D) of the Act.

a. Agency

In both *Ironworkers Local 433 (Swinerton & Walberg Co.),* 308 NLRB 757, 761 (1992) and *Ironworkers Local 433 (Otis Elevator Co.),* 309 NLRB 273 (1992) the Board has found that a parent union body is a proper respondent as an agent of its local union in a 10(k) proceeding where the parent body has initiated proceedings to compel arbitration on behalf of its local. Thus, both Respondents are proper parties to this proceeding and the International by requesting Plan enforcement of the Kelly and Greenberg awards on behalf of Local 200 and by seeking a Plan complaint for the plastering work at all Los Angeles Unified School District public works projects in the 12 Southern California Counties has acted as Local 200's agent.

b. Effect of Withdrawing the Request for Enforcement of the Kelly and Greenberg Awards and the Plan Complaint

There is no merit to Respondents' argument that their withdrawal of the Kelly and Greenberg enforcement request and of the Plan complaint nullifies their coercive effect. The mere failure to state that there will be compliance with the Board's 10(k) awards is not what occurred here. Rather, Respondents sought to enforce arbitration awards contrary to the Board's 10(k) order when the International sought enforcement of the Kelly and Greenberg awards on January 9, 2007. Likewise by seeking a Plan complaint awarding them the disputed plastering work, Respondents acted contrary to the Board's 10(k) decision. The International's withdrawal of the enforcement request on January 13, 2007 was based on its understanding that SDI was complying with Kelly and Greenberg, thus leaving the door open for a renewed threat of enforcement. Respondent's January 13, 2007 withdrawal of the request for a Plan complaint was conditional and left open the possibility that the request for a complaint would be renewed if it found work was included under the Plan. Both the Plan complaint and enforcement of the Kelly and Greenberg awards continued to hang like Damocles' sword over SDI and constitute genuine threats under section 8(b)(4)(ii)(D) of the Act.

Respondents' argument that neither the Respondents' request for enforcement of the arbitration awards nor the Plan complaint can be coercive because only the Plan administrator can authorize those actions must also fail since a threat to take action may be coercive even if the threat is not carried out. The Board has held a threat to picket may be coercive under section 8(b)(4)(ii)(B) of the Act even if the threat is not carried out. *Amalgamated Packinghouse*, 218 NLRB 853 (1975). Thus, both the requests for enforcement of the Kelly and Greenberg awards and the Plan complaint, notwithstanding their withdrawal, were threats to SDI within the meaning of section 8(b)(4)(ii)(D) of the Act.

I find that by pursuing the enforcement of the Kelly and Greenberg awards and the Plan complaint after the Board issued its award in SDI-II, Respondents have violated section 8(b)(4)(ii)(D) of the Act.

3. The Agreed upon Method for Resolving Jurisdictional Disputes

Respondents argue finally that by pursuing a Plan award was proper because the parties were bound to the Plan through the PSA. This argument has been previously decided by the Board in SDI-II when in concluded that the parties were not bound to an agreed upon method of dispute resolution at all potential job sites. Moreover, once the Board ruled in the 10(k) proceeding in SDI-II, it preempted pursuit of a contrary result in any other forum.

As, I ruled previously,[25] Respondents' argument that there was no jurisdictional dispute herein has been decided by the Board in SDI-I and SDI-II. It is a foundational issue that may not be relitigated here.

Conclusions of Law

1. Standard Drywall, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Operative Plasterers' & Cement Masons' International Association and Operative Plasterers' & Cement Masons' International Association, Local 200, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Operative Plasterers' & Cement Masons' International Association and Operative Plasterers' & Cement Masons' International Association, Local 200 have engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act since December 13, 2006, by pursuing after the Board's 10(k) award in SDI-II the Kelly and Greenberg awards and since January 9, 2007, by requesting a Plan complaint seeking plastering work at public works projects in the 12 Southern California Counties performed by SDI employees represented by the Carpenters with an object of forcing or requiring SDI to assign the work, described below, to employees represented by Local 200 rather than to employees represented by Carpenters. The work in question consists of plastering work on public works projects in 12 Southern California Counties as set forth more specifically in the Board's above cited Decision and Determination of Dispute in SDI-II.

4. Respondent Operative Plasterers' & Cement Masons' International Association, Local 200 has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act since December 13, 2006, after the Board's 10(k) award in SDI-II by pursuing the Pullen and Tortious Interference lawsuits with an object of forcing or requiring SDI to assign the work, described below, to employees represented by Local 200 rather than to employees represented by Carpenters. The work in question consists of plastering work on public works projects in 12 Southern California Counties as set forth more specifically in the Board's above cited Decision and Determination of Dispute in SDI-II.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

CGC and SDI as part of the remedy herein seek restitution of legal costs and fees in conjunction with defending the Pullen and Tortious Interference lawsuits, defending the enforcement of the Kelly and Greenberg awards and defending the request for a Plan complaint.

In *Air Line Pilots Association (ABX Air, Inc.),* 345 NLRB No. 51 (2005), the Board affirmed the judge's remedy awarding legal fees and expenses. In *Air Line Pilots Association,* after a series of mergers and acquisitions, Respondent Airline Pilots Association filed a grievance alleging that employer DHL had violated its collective bargaining agreement with the Pilots Association by subcontracting out work. DHL filed an action for declaratory relief in

[25] ALJ Exh. 3.

United States District Court seeking a judgment that it had not violated the contract. The Pilots Association filed a counterclaim seeking expedited arbitration and an injunction restraining DHL from contracting out its air operations services. The Board found that both pursuit of the grievance and the counterclaim constituted unlawful secondary activity within the meaning of section 8(b)(4)(ii)(A) and (B) and 8(e). In granting an award of legal fees and expenses the Board said:

> The judge recommended that the Board order the Respondent to reimburse DHL for "all reasonable expenses and legal fees, with interest, incurred in defending against the grievance and counterclaim." Reimbursement is the appropriate remedy where the Respondent has engaged in actual coercion. *See Food & commercial Workers Local 367 (Quality Foods),* 333 NLRB 771 (2001); *Service Employees Local 32B-32J (Nevins Realty), supra*, 313 NLRB at 403. We clarify, however, that the Respondent is not liable for legal expenses related to DHL's initiation of the district court litigation. The Respondent is liable only for expenses related to defending against its grievance and counterclaim.[26]

Having found that the Respondents' pursuit of the Kelly and Greenberg awards and the Plan complaint after the Board's order in SDI-II and Local 200's pursuit of the litigation in the Pullen and Tortious Interference lawsuits subsequent to the Board's order in SDI-II constitute coercion within the meaning of section 8(b)(4)(ii)(D) of the Act, I will recommend to the Board as part of the remedy herein an award of reasonable legal fees and costs incurred after December 13, 2006 against Local 200 in conjunction with defending the Pullen and Tortious Interference lawsuits, defending the enforcement of the Kelly and Greenberg awards and defending the request for a Plan complaint and against the International in conjunction with defending the enforcement of the Kelly and Greenberg awards and defending the request for a Plan complaint.

Having found that Respondents have engaged in and are engaging in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended. [27]

ORDER

A. Respondent Operative Plasterers' & Cement Masons' International Association, its officers, agents, and representatives, shall:

1. Cease and desist from, in any manner, threatening to and actually seeking to enforce against SDI the Kelly and Greenberg arbitration awards and threatening to and actually seeking a Plan complaint seeking plastering work performed by SDI employees represented by the Carpenters Union in the 12 Southern California Counties on public works projects with an object

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[26] *Airline Pilots Association*, slip op. at 7.

[27] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

of requiring SSI to assign the disputed work to members of Respondent Local 200 rather than to members of the Carpenters.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Unconditionally withdraw and cease threatening to enforce the Kelly and Greenberg awards and unconditionally withdraw the request for a Plan complaint seeking plastering work at public works projects in the 12 Southern California Counties performed by SDI employees represented by the Carpenters.

(b) Reimburse SDI for reasonable legal expenses and fees associated with the defense of the Kelly and Greenberg awards and the Plan complaint after December 13, 2006.

(c) Within 14 days after service by the Region, post at its office and meeting halls copies of the attached Notice, in English and Spanish, marked "Appendix A."[28] Copies of the Notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees/members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of the notice to the Regional Director for posting by SDI, if it is willing, at all locations on the jobsite where notices to its employees customarily are posted.

(e) Notify the Regional Director in writing within 21 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Operative Plasterers' & Cement Masons' International Association, Local 200, its officers, agents, and representatives, shall:

1. Cease and desist from

(a) In any manner threatening to and actually seeking to enforce against SDI the Kelly and Greenberg arbitration awards and threatening to and actually seeking a Plan complaint seeking plastering work performed by SDI employees represented by the Carpenters Union in the 12 Southern California Counties with an object of requiring SSI to assign the disputed work to members of Respondent Local 200 rather than to members of the Carpenters.

(b) In any manner maintaining, subsequent to the Board's 10(k) determination in SDI-II, the Pullen and Tortious Interference lawsuits with an object of forcing or requiring SDI to assign the work, described below, to employees represented by Local 200 rather than to employees represented by Carpenters. The work in question consists of plastering work on

[28] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

public works projects in 12 Southern California Counties as set forth more specifically in the Board's above cited Decision and Determination of Dispute.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Unconditionally withdraw and cease threatening to enforce the Kelly and Greenberg awards and unconditionally withdraw the request for a Plan complaint seeking plastering work at public works projects in the 12 Southern California Counties performed by SDI employees represented by the Carpenters.

(b) Withdraw the Pullen and Tortious Interference lawsuits.

(c) Reimburse SDI for reasonable legal fees and costs associated with defense of the Pullen and Tortious Interference lawsuits, the Kelly and Greenberg awards and the Plan complaint after December 13, 2006.

(d) Within 14 days of receipt from the Region, post at its office and meeting halls copies of the attached Notice, In English and Spanish, marked "Appendix B."[29] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material.

(e) Sign and mail sufficient copies of the notice to the Regional Director for posting by SDI, if it is willing, at all locations on the jobsite where notices to its employees customarily are posted.

(f) Notify the Regional Director in writing within 21 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., February 11, 2008.

_____

John J. McCarrick
Administrative Law Judge

[29] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or threaten to enforce the Kelly and Greenberg awards or a Plan complaint seeking plastering work performed by SDI employees represented by the Carpenters Union on public works projects in the 12 Southern California Counties with an object of requiring SSI to assign the disputed work to members of Respondent Local 200 rather than to members of the Carpenters after issuance of the Board's 10(k) determination in SDI-II.

WE WILL unconditionally withdraw our request for enforcement of the Kelly and Greenberg awards and our request for a Plan complaint seeking plastering work performed by SDI employees represented by the Carpenters Union on public works projects in the 12 Southern California Counties with an object of requiring SSI to assign the disputed work to members of Respondent Local 200 rather than to members of the Carpenters after issuance of the Board's 10(k) determination in SDI-II.

OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor
Los Angeles, California 90017-5449
Hours: 8:30 a.m. to 5 p.m.
213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.

APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or threaten to enforce the Kelly and Greenberg awards or a Plan complaint seeking plastering work performed by SDI employees represented by the Carpenters Union on public works projects in the 12 Southern California Counties with an object of requiring SSI to assign the disputed work to members of Respondent Local 200 rather than to members of the Carpenters after issuance of the Board's 10(k) determination in SDI-II.

WE WILL NOT maintain the Pullen and Tortious Interference lawsuits with an object of forcing or requiring SDI to assign the work, described below, to employees represented by Local 200 rather than to employees represented by Carpenters. The work in question consists of plastering work on public works projects in 12 Southern California Counties as set forth more specifically in the Board's above cited Decision and Determination of Dispute.

WE WILL unconditionally withdraw and cease threatening to enforce the Kelly and Greenberg awards and unconditionally withdraw the request for a Plan complaint seeking plastering work at public works projects in the 12 Southern California Counties performed by SDI employees represented by the Carpenters.

WE WILL withdraw the Pullen and Tortious Litigation lawsuits.

OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL 200, AFL-CIO

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's

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